IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1649

Henry Merritt Farnum
Applicant for Admission to the Bar
of the State of New York
Appellant

v.

Committee on Character and Fitness
Supreme Court of the State of New York
Appellate Division, First Judicial Department
Appellee

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPELLANT'S
SUPPLEMENTAL BRIEF, JUNE 14, 1976, AND
REPLY BRIEF TO MOTION TO DISMISS

Henry Merritt Farnum
Appellant, *pro se*

Executive House
225 E. 46 Street
New York, N.Y., 10017

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On Appeal from
The Court of Appeals, State of New York

APPELLANT'S SUPPLEMENTAL BRIEF, JUNE 14, 1976

Edited version of address by J. Kenneth Campbell, Esq., released for quotation on May 21, 1976 by his letter to the appellant.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

SYMPOSIUM

CURRENT ISSUES WITH REGARD TO THE MENTALLY DISABLED AND THE LAW

House of the Association, Meeting Hall
September 29, 1975, 7:30 p.m.

THE BACKGROUND OF THE NEW YORK LEGAL FRAMEWORK

J. KENNETH CAMPBELL
Member, New York Bar

INTRODUCED BY PRESIDING OFFICER

...As some of you may know, the Bar Association took the lead a number of years ago in developing new areas and new principles in dealing with the problems of the mentally ill, and especially in regard to the hospitalization and discharge of mental patients. [Association of the Bar of the City of New York, *Special Committee to Study Commitment Procedures*, Mental Illness and Due Process: *Report and Recommendations on Admission to Mental Hospitals Under New York Law* (In cooperation with the Cornell Law School. Ithaca, N.Y.: Cornell University Press, 1962, 303 pp.)] Subsequently the Committee went forward with another study in the area of the criminal defendant and other persons in the criminal justice system who became mentally ill. That study too was a pioneering book--the report was published as a book. It laid the groundwork for legislation and for important judicial decisions, some of which I would like to comment on, later on in the evening.

The work of the lawyers ... is an ongoing process ... as a small contribution to the work that every community must do to keep current.

So it is a very great pleasure for me to present to you Mr. J. Kenneth Campbell.

J. KENNETH CAMPBELL, ESQ.

Thank you, Simon. As the man said, "enough is enough already." So let's get down to business.

My assignment this evening is among the easiest of any on the panel. The panel is here to discuss current developments. I am here to bring you up-to-date on how we got to be where we are. Strange as it may seem, it has only taken the last ten years to get us where we are.

Ten years ago...we're not celebrating a Bicentennial--let's say, a "ten-Centennial." Ten years ago the law in this State was by modern standards so archaic that, as I describe it to

you, you will, I think, find it hard to believe. And yet today in that short ten years we are, as Simon has said, among the most progressive states in the union in the area of the rights of the mentally ill and the mentally retarded.

Now, I have no funny stories. I am going to get right down to the heart. I am going to start you off with a true-false quiz.

Take yourself back to, let us say, August 31, 1965, approximately ten years ago. I will put to you some questions as to what could have happened to you--anyone here this evening--under the law as it then prevailed. Let's start with question number one.

You--any one of you--could, in August of 1965, have been labeled as a psychotic by two physicians, not psychiatrists, found to be such by a Supreme Court justice on papers read by him in chambers, sent to a State hospital, held against your will without ever receiving notice of the charges against you, without any right to counsel, without any opportunity to confront or to cross-examine your accusers, or ever receiving any hearing whatever. True, or false?

True. Under the law as it stood in this State prior to the major amendments made effective September 1, 1965, we had this wonderful-looking statute on the books, which said that no person could be committed to a mental hospital unless he was given notice of the charge, had a hearing before a judge, indeed had a right to a jury trial if he disagreed with the judge's conclusion. But, in the fine print, should the certifying physician find that it would be detrimental to the patient to give him notice of the charges against him, the hearing mandatorily had to be dispensed with. [*For said statute see the Jurisdictional Statement in the instant case ("J.S."), Appendix B-4, B-5, "provisions repealed since 1956." See appellant's*

First and Second Reasons (J.S., pp. 19-23); and Fifth thru Seventh Reasons (J.S., pp. 24-26). Said Reasons are basic to the Third and Fourth Reasons (J.S., pp. 23-24).]

The result was that, except in downstate New York to which I will later advert, there were in that year as I said before literally thousands of people being committed involuntarily without ever even knowing that they had a right to a hearing, a right to a jury trial, a right to a lawyer, a right to cross-examine, and all the rest of it.

Let's try another. If so hospitalized, under such an order as I just described against your will, you could be kept in the hospital indefinitely even until your old age or unto your grave, without any further judicial action beyond the order signed in chambers which I just described--without any opportunity for a hearing, cross-examination, etc.--on the mere filing of a certificate by the hospital director to the effect that you were, indeed, mentally ill. This certificate, under my hypothetical, would simply be filed with the appropriate County Clerk in whatever part of the State. Again you know that the answer to my "true and false" is: True. That's the way it then worked. [*J.S., Appen. B-5, para. 7.*]

Now, here in downstate New York, things were a little different by virtue of the individual action of our justices of the Supreme Court here in Manhattan, Brooklyn, the Bronx. Here indeed you were accorded the right to a hearing. [Not in the instant case. J.S., p. 23, *Farnum v. New York State*, "The Question;" and J.S., pp. 19-23, First and Second Reasons.] In those days Bellevue was--forgive me, Dr. Zitrin--the assembly line, the conveyor belt, through which these patients went on their way to the State hospitals. The right to a hearing consisted of being brought into a courtroom in the hospital, usually in your pajamas and bathrobe, where you confronted a Supreme Court

Judge in his robes, and one or more hospital psychiatrists who gave out with what, certainly to the patient, must have seemed like jargoneze--"This patient is disassociated, delusional, and demonstrating schizophrenic tendencies...."

The Judge would say, "Yes. And what do you have to say, Mr. Patient?"

"What did he say? What did he say?"

That was the hearing. It was skeletal, by its very nature. Again, counsel were virtually unknown in such hearings. And the courts, God bless them, had nothing to go on except the inarticulate responses of the patient, and the professional pronouncements of the psychiatrist.

....

...Until the decision of the U.S. Supreme Court in <u>Baxstrom v. Herold</u> in 1966.

Now, all of that was ten years ago. All of that is grossly changed over this ten year period....

...in reference to my former work on the Legal Aid Committee of this Association, in the late '50s, early '60s, this Association was being inundated with letters from mental patients...throughout the State....

And these letters by routine came into the Committee on Legal Aid of the Association, and eventually there the realization grew that there was a problem out there...a special committee of this Association was organized to create what became the Committee on the Study of Commitment Procedures and the Law Relating to Incompetents. We had a paid staff. We had doctors on the committee, lawyers on the committee, judges on the committee, and above all the Commissioner of Mental Hygiene on the committee....

In any event, this committee set to work, and its trials and tribulations within the committee-room were most extensive. Visualize what we were facing. We were facing on one hand, lawyers saying, "We must have due process of law. We cannot put these people away without a hearing. We must

have the right to cross-examination," etc., etc. On the other hand, from the other side of the table we were hearing from the doctors, "You are meddlers. You are interfering with medical judgments. You have no competence to tell a physician who is in need of hospitalization, and who is not." And so the lines were very strongly drawn, very early on.

In the end, that committee publishing its report in 1962 tried to find the best balance between the views of the physicians on the one hand, and the views of the lawyers on the other. What we came to was a system that works about like this.

Let's eliminate the mandatory, court-ordered admission that I described to you earlier. Let's go into a system of medical admission into the hospital, on nothing more than the certificate of two physicians to the effect that the person is mentally ill. But immediately inform that patient that he has a right to a hearing, and that he has a right to assistance, and that he can demand a hearing. Simultaneously, let us create and put into operation a wholly new agency never tried before anywhere in the country, and I believe to this date, ten years after enactment of our statute, there is still nothing quite like it anywhere in the land. Let us create what we will call the Mental Health Information Service, as an arm of the court. Let us put representatives of the court into each mental hospital in the State. Let the patients have contact with those representatives of the court. Let those representatives of the court look into the case of every patient involuntarily detained, and where a hearing is demanded or held let that Service assemble the facts and compile the data to make a report on which the court can make an informed judgment, instead of this skeletal type of hearing to which I referred earlier.

Moreover, once the patient is in, let us not permit this situation where he can go to the back

wards of the hospital and stay there forever.... We proposed what came to be known as periodic judicial review....

I want to tell you what an educational experience it was for me to bring that proposal from the pages of a book, to enactment of a law which became law in 1965. It was done principally through the splendid legislative efforts of a Senator named Metcalfe, who literally brought the doctors, the lawyers, and the judges into the same room, banged the table, banged their heads, and demanded agreement on point after point after point. In the end when it was enacted, as indeed it was in 1965, it had the support of virtually every interested group throughout the State, both on the medical and the legal side.

So, having done that much and having felt wonderfully enthusiastic about our great achievements, we then turned with this Committee to the criminal side dealing with those defendants who had either been convicted on the one hand, and who had not been convicted on the other hand, and we set out to do a study of those. While we were in the midst of the study, which was not completed and published until 1967, the ground was changing under our feet so quickly that we could scarcely keep up with the developments in the courts.

What happened was that a wave had come along, had come out of the ocean and onto the beach. Not only were groups such as ours working in this area, but the courts were beginning to rise up and say, "No, you can't do it this way. You must have due process. You must give these people the rights to which they were entitled. The status of mental patients, be he prisoner or nonprisoner, does not change a man's Constitutional rights." So there was flood of these cases during the '60s and the early '70s....

...This whole trend on the part of the lawyers has been one to put the determination in the hands of the judiciary--the final determination....

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Supreme Court, Appellate Division
First Judicial Department

Office of Committee on Character and Fitness

ROBERT E. KEEGAN, Secretary

41 MADISON AVENUE, NEW YORK, N.Y. 10010
683-7740

June 10, 1976

Mr. Henry Merritt Farnum
Executive House
225 East 46th Street
NY, NY 10017

Dear Mr. Farnum:

With reference to my letter of May 10, I presented your letter of May 5 and attached "Notice of Personnel Director Action" to the Character Committee at its meeting on June 7, 1976. After discussion, the Committee unanimously declared that it adhered to its original decision requiring you to appear before a Court-appointed psychiatrist so that his report may be used as an aid to the Committee in considering your application. The Committee further declared that it adopted the statements made to you in my letter of March 2, 1976.

Very truly yours,

R. Keegan

Robert E. Keegan

REK:lrs

APPELLANT'S REPLY BRIEF TO MOTION TO DISMISS

FINALITY OF THE DECISION OF THE COURT OF APPEALS ON EIGHT SUBSTANTIAL FEDERAL CONSTITUTIONAL ISSUES

I. The appellant raised each of the eight Constitutional points before the Court of Appeals of the State of New York. The issue on the merits of said Constitutional points was joined by the appellee.

A. Appellant's brief dated December 10, 1975, set forth said eight Constitutional points designated I thru VIII. Said brief was offered December 10, 1975, filed and served January 15, 1976, printed under date of January 31, 1976, and filed and served February 4, 1976.

B. Appellee's affidavit January 16, 1976, requested decision on the merits (p.1, para. 3), supported by each of Exhibits A, B, C, and D on the merits. Appellee joined issue on each Constitutional point on the merits. He argued that each Constitutional point is "irrelevant." (Said Exhibit A, p. 6, paras. 24-25.)

II. Said Constitutional points I thru VII involving New York State statutes have been recognized as substantial federal questions since the late 1950's. (Supplemental Brief, *supra*, "S.B.", pp.1-7, see appellant's litigation on said Constitutional questions since 1957, cited in Jurisdictional Statement, hereafter JS, pp. 13-14.)

III. The "decision" of the Court of Appeals February 12, 1976, is a final decision exhausting appellant's State remedies and starting the running of appeal time. (JS, App. C-5.) This appeal seeks relief from the result that the State statutes challenged in said points I thru VII, and the State action in point VIII, continue to be enforced after said decision.

Those actions by the State are reaffirmed by appellee's letter to the appellant June 10, 1976 (SB, *supra*, p. 8). Appellee Character Committee of The Appellate Division, First Department, will continue to enforce said eight points thru its Court which thrice has denied each Constitutional argument by appellant on said eight points. (JS, App. C-1,C-2,C-3.)

Said decision is final because appellant cannot now file a second appeal within 30 days of a prior order or judgment.

APPELLANT ACTED REASONABLY IN PROSECUTING HIS APPEAL

IV. The new rule of the Court of Appeals shortened to nine months the time within which an appeal must be prosecuted. Previously there was no time limit. Said new rule was received by the Bar Association Library on November 6, 1975, fourteen days before appellant's nine-month period expired. If appellant had examined said rules each month after his notice of appeal, he would not have received notice until his time for prosecution had expired. If he had re-read said rules each day, he would have had fourteen days in which to prosecute.

In appellant's telephone conversation in early 1975 with the office of the Motion Clerk of said Court concerning a copy of the rules of the Court, he was referred to standard sources [App.A-1, herein]. Appellant was not put on notice of any new rules to be obtained from said Court.

Therefore appellant urges that having made diligent inquiry to the Court as to its rules, the effective date for him of the shortened time period was the date of receipt of the new rules by the Law Library on November 6, 1976.

In fact, appellant offered to submit his brief on December 10, 1975. That was twenty days after the nine months under the new rule had expired, and thirty-four days after the new rule was

received by the Law Library. (JS, App. A-3.)

When the period is shortened for prosecution so as to avoid dismissal for want of prosecution, a reasonable time must be allowed for submission of pending actions.

Dismissal was denied as unreasonable when a notice to dismiss was made less than one month after the new, shorter statutory time period became effective. The action for a peremptory writ had been instituted within about six weeks of said effective date. (*Coleman v. Superior Ct.* (1933), 135 Cal. App. 74, 26 P.(2d) 673.)

Denial of dismissal was held proper, altho more than a year had passed since the statute setting a shorter time period had become effective. *Shoemaker v. Superior Ct.* (1935) 4 Cal. App.(2d) 586, 41 P.(2d) 343; 112 A.L.R. 1165-6.)

The rule was established that "a reasonable time must have elapsed after the change in the remedy, to permit the party affected to safeguard his rights as against a mandatory dismissal. One year and five months after the statutory change to a shorter period, was a reasonable time. *Superior Oil Co. v. Superior Ct.* (1936) 6 Cal.(2d)113, 56 P.(2d) 950.)

In the instant case, for the appellant having made diligent inquiry as to the Court rules, the earliest reasonable date for the "party affected to safeguard his rights as against a mandatory dismissal" began to run on the date that the new, shorter time period was received at the Law Library on November 6, 1975; or such reasonable later time as this Court shall determine.

If said reasonable date is most stringently set at the first day of arrival of said new rule on November 6, 1975, the time period in the instant case of thirty-four days compares favorably with the periods of "less than one month" and "about six weeks" in the *Coleman* case *supra*, in which dismissal was denied.

V. It is not necessary that this Court find an

abuse of discretion. This Court need only decide that appellant acted reasonably under the facts of this case, and that the decision of said eight Constitutional points passed therefore from the Court of Appeals to this Court.

APPELLANT'S PROFESSIONAL CAREER IS IRREPARABLY INJURED BY SAID DECISION FEBRUARY 12, 1976

VI. Injury to an appellant by dismissal of a cause of action has been held to be reversible error even when there was admitted injury to an appellee by a delay in prosecution.

> There is strength in appellee's argument that it might be prejudiced by the passage of time;[3] but this argument is not sufficiently supported factually to overbalance the certainty of prejudice to appellant if deprived entirely of a retrial as authorized by our previous decision. *Rankin v. Shayne*, (1960) 108 App DC 47, 280 F2d at 56.

In the instant case, accepting appellee's own statement March 2, 1976 subsequent to the dismissal of said appeal, appellee has not been injured by any delay. (JS, App.A-2, para.2.) That conclusion is consistent with appellee's letters to the appellant January 7, 1975, December 16, 1975, its acceptance of appellant's letter September 30, 1975, and its pending Motion, none of which claim any injury from any delay. (Appee's Aff. January 16, 1976, Exhibits B, C and D respectively.)

A fortiori, the injury to the appellant's professional career by said dismissal overbalances any request by the appellee, who is uninjured by any delay in appellant's application for admission to the Bar.

VII. This Court further holds that, when the question of a holding by a Court on Constitutional points is tangled, this Court will grant certiorari as to said points, even if appeal on said points is not available. *Spencer v. Texas*, 385 US 554, 17 L.Ed.2d 606, 87 S.Ct. 648 (1966); *Dahnke-Walker Milling Company v. Bondurant, infra.*

APPELLEE DEMANDS THAT SAID APPELLATE DIVISION DECIDE ALL EIGHT SUBSTANTIAL CONSTITUTIONAL QUESTIONS

VIII. The appellant insisted upon said Constitutional points I thru VI before the appellee Character Committee, plus Point VII in said Appellate Division. (Appellant's initial draft of his petition filed with appellee on March 30, 1974 for the third interview on April 29, 1974; twenty-one specific citations, referring to each of the four interviews and set forth in appellant's brief January 31, 1976, p. 24; and in the final draft of appellant's petition filed October 2, 1974.)

This Court should apply in the instant case its holding:

> The court did not accede to the insistence, but applied and enforced the statute. Of course, that was an affirmation of its validity when so applied. *Dahnke-Walker Milling Company v. Bondurant*, 257 U.S. 282, 66 LE 239, 42 SC 106, with citations.

THEREFORE THIS COURT MUST INVOKE ITS JURISDICTION TO RESOLVE SAID EIGHT SUBSTANTIAL, FEDERAL CONSTITUTIONAL QUESTIONS, BECAUSE THE APPELLEE, AND THE COURT OF THE APPELLATE DIVISION TO WHICH THE APPELLEE WILL REFER SAID QUESTIONS, BOTH HOLD ALL CONSTITUTIONAL ISSUES TO BE IRRELEVANT.

CONCLUSION

THEREFORE PROBABLE JURISDICTION IN THIS COURT SHOULD BE NOTED, AND APPELLEE'S MOTION TO DISMISS SHOULD BE DENIED.

Dated: New York, New York, June 14, 1976.

Henry Merritt Farnum
Appellant, *pro se*

Executive House
225 E. 46 Street
New York, New York 10017

(212) 489-3594

AFFIDAVIT AS TO
NEW YORK COURT OF APPEALS RULES

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

TO WHOM IT MAY CONCERN:

Henry Herritt Farnum, residing at Executive House, 225 E. 46 Street, New York, New York 10017, being duly sworn, deposes and says.

The date of the telephone conversation set forth below was subsequent to the filing of the first Notice of Appeal by the undersigned to the Court of Appeals of the State of New York on November 19, 1974, and is believed to be shortly after his filing of the second Notice of Appeal thereto on February 19, 1975.

The undersigned telephoned the office of the Motion Clerk of the Court of Appeals concerning the rules of said Court applicable to his prosecution of his appeal. The Motion Clerk referred the undersigned to the usual rules of said Court. The usual publication of said rules was the volume of McKinney's replaced on November 6, 1975 (U.S. May 12, 1976, Appen. A-3). The undersigned obtained a copy of said rules then on the Law Library shelf, and abided by them.

The undersigned was not put on notice by said Motion Clerk as to any new rules to be obtained from said Court.

Henry Herritt Farnum

Sworn to before me this 14 day of June, 1976.

NOTARY

[SEAL]

MICHAEL E. SHAPIRO
NOTARY PUBLIC, State of New York
No. 41-3613625
Qualified in Queens County
Commission Expires March 30, 1977